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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LYNDON H. LAROUCHE, JR.,
WILLIAM WERTZ, EDWARD SPANNAUS,
MICHAEL BILLINGTON, DENNIS SMALL,
PAUL GREENBERG and JOYCE RUBINSTEIN
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RONALD THOMAS SPANN AMICUS CURIAE IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

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QUESTION PRESENTED

In a complex case involving multiple and highly controversial defendants, did the trial court violate the petitioners' constitutional right to present a defense to the charges against them, when the trial court:

(1) rushed the defendants to trial 38 days after indictment, repeatedly denying their motions for a continuance of the trial date and thereby denying them adequate time to prepare a defense;

(2) denied defendants' motion for disclosure of exculpatory information and quashed a subpoena for specifically-identified FBI documents which defendants asserted would support their theory of defense; and

(3) granted a government motion *in limine* which barred admittedly relevant evidence concerning government harassment, financial interference and a government-initiated involuntary bankruptcy proceeding, thereby excluding a major portion of defense evidence and preventing the defendants from presenting their defense to the jury on an equal basis with the prosecution?

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INTEREST OF AMICUS

As the former Chair of the American Bar Association's Human Rights Committee who has an abiding interest in the principles of equity and justice your amicus, Ronald Thomas Spann, is concerned that the procedure followed by the district court and endorsed by the Court of Appeals in this case sets a dangerous precedent in violation of the basic tenets established by our Constitution for the protection of all accused. This amicus brief is submitted with the consent of all parties.

FACTUAL STATEMENT

This case involves a four-time minority presidential candidate and six of his associates, who had been the subjects of years of intensive investigation by the FBI and other agencies. They had also been the subjects of widespread and generally hostile pretrial publicity.

Three of the seven defendants—including Lyndon LaRouche—had previously been indicted by a federal grand jury in Boston during the period from October 1986 to June 1987. After lengthy pretrial proceedings, a trial commenced in Boston in December 1987. The trial was interrupted for weeks of hearings on classified information and government misconduct[1] and a mistrial was declared on May 4, 1988. The prosecutors vowed to retry the case, and a retrial was scheduled. While the Boston retrial was pending, the U.S. Attorney's Office for the Eastern District of Virginia obtained indictments of Mr. LaRouche and six associates in that district. The two Boston prosecutors subsequently joined the Virginia prosecution team.

The Virginia indictment was issued on October 14, 1988, and arraignment was held, on Monday, October 17. At arraign-

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[1] *U.S. v. The LaRouche Campaign, et. al.*, 695 F Supp 1265 (Dist. Mass. 1988); *U.S. v. The LaRouche Campaign, et. al.*, 695 F Supp 1290 (Dist. Mass. 1988); *U.S. v. The LaRouche Campaign, et. al.*, 695 F Supp 1283 (Dist. Mass. 1988).

ment the court set a schedule calling for pretrial motions to be submitted by November 7, argument on the motions on November 10, and trial to commence on November 21. When the government objected to having only two days to respond to motions, the court indicated its attitude toward pretrial motions:

> ". . . 90 percent of these motions are going to come out of the word processor. . . . You have seen them before, and I have seen them before." (Tr. Oct. 17, 1988, p. 8.)

On October 28, counsel advised the court that they might have difficulty with the trial schedule; the court conceded that it was "pushing the defendants a bit hard on this case on time." (Tr. p. 12.) On November 4, counsel moved for a 60-day continuance, pointing to the complexity of the case, that it involved "a warehouse full of documents," hundreds of hours of consensual tape recordings, and witnesses all across the country. The court denied the motion.

Pretrial Motions

Despite the incredible time pressure a substantial Motion for Disclosure of Exculpatory Material was filed. This was extremely specific as to the facts of this case. It contained 182 separate requests for information in the government's possession including:

(1) information which would tend to refute the government's characterization of the NCLC (the philosophical association founded by LaRouche) as a criminal enterprise and a global conspiracy.

(2) evidence of harassment of defendants and their organizations, and of financial interference which impaired their ability to repay loans.

(3) the role of government agencies in the campaign of derogatory media coverage which diminished defendants' public support and fundraising ability.

(4) direct interference by government agencies into the political and financial relationship between defendants and various contributors and lenders.

(5) efforts within the government to discredit defendants' influence within the Reagan administration and their access to administration officials.

(6) improper targeting of defendants for law enforcement investigation by political enemies of defendants within law enforcement and intelligence agencies.[2]

Defendants also submitted a Notice pursuant to the Classified Information Procedures Act (CIPA), 18 U.S.C. App. Sec. V, giving notice that they reasonably expected to cause disclosure of the "existence and operational details of United States government counterintelligence, counterterrorism or domestic security activities directed at the finances and political activities of persons and organizations associated with defendant LaRouche in the United States and other countries." They noted that the FBI had acknowledged the existence of approximately 4,700 pages of documents, all but 350 of which were being withheld on national security grounds. The CIPA Notice stated that defendants believed that these FBI documents, and others, would show that beginning in 1983, elements within the United States government began activities to disrupt the financial and organizational support of LaRouche political causes and activities, and it gave some examples from already-disclosed documents. (Defendants also attempted to subpoena the cited 4,700 pages of FBI documents for trial, but on two occasions the trial court denied access to the documents.)

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[2] These requests were not just speculative. The defendants had obtained, through FOIA and civil discovery, personal correspondence from Henry A. Kissinger to FBI Director William Webster, urging an FBI investigation of defendants; a 1986 NSC telex message between Iran-Contra defendants Richard Secord and Oliver North which referred to "gathering info against LaRouche." Other similar documents were also cited.

Government Motion in Limine

One day before pretrial motions were to be argued, defense counsel received copies of a motion *in limine* filed by the government. The government candidly asserted its determination to cut off defendants' ability to present their planned defense:

> "The defendants have indicated that they intend to defend this case by claiming vindictive prosecution, harassment by the government, and that their inability to repay loans was due to 'financial warfare' brought against them by the government. . . . This matter should be resolved prior to trial lest this case begins with claims by the defendants—as they did in Boston—that they intend to prove a 17-year pattern of harassment and persecution of their organization at the hands of the FBI.

The government's concerns about a repeat of the Boston trial were not without foundation. After five months of trial there and the declaration of a mistrial, the jurors took an informal poll among themselves, and voted to acquit all defendants on all charges. "There was just too much question of government misconduct in what was happening to the LaRouche campaign," one juror was quoted as saying. (*Boston Herald*, May 5, 1988)

The prosecution's motion *in limine* first addressed the matter of the involuntary bankruptcy proceedings which the government itself (operating through the U.S. Attorney for the Eastern District of Virginia) had instituted against three publishing companies operated by associates of the defendants. Upon an *ex parte* motion brought by the government, the Bankruptcy Court had issued an order appointing interim trustees and directing the seizure of the three companies by U.S. Marshals. On April 21, 1987, Marshals did raid and padlock offices of the companies; they never reopened for business again.

The prosecution's motion *in limine* conceded that the bankruptcy seizure was relevant to show that after April 1987, the

companies were neither able to borrow additional money or repay any lenders.[3] However, the government proposed, "No evidence should be allowed relating to the fact that the bankruptcy was initiated by the United States or the fact that the United States Marshals Service padlocked the business[es] . . ."(Government Motion *in Limine*, p. 13.)

On November 10, the court summarily denied all substantive defense motions, while granting the government's motion *in limine*. The order stated, *inter alia*:

> "The motion for disclosure of exculpatory information is denied. For the reasons set out in the government's motion *in limine*, the discovery matters concerning the infiltration, harassment and financial warfare are irrelevant to the charges contained in the indictment, nor is the belief that the government was 'out to get them.' " (sic) (Order, Nov. 10, 1988, p. 1.)

The trial court granted the government's motion *in limine* to the following extent:

> "1. Reference to the bankruptcy proceedings as a reason for non-payment of the loans which are the subject of the indictment will be permitted; that the bankruptcy was an involuntary one, . . . will be admissible; that the government was the creditor which initiated the involuntary bankruptcy proceedings will not be admitted . . .
>
> "2. Evidence as to other FBI or law enforcement activities, use of informants (other than possible impeachment should the informant testify), FBI infiltration, intelligence or security activities directed at the finance and political activities of

[3] In fact, all borrowing by the three companies had ceased prior to this, so the principal effect of the government's bankruptcy proceeding was to prevent the companies from obtaining any further revenues through sales and contributions, and bar them from repaying any loans.

> persons and organizations associated with LaRouche will not be admitted, except that the defendants may show that there were unexpected actions by some outside influence, including the government, which had the effect of frustrating their expectation that repayment would be made. Even then the court will not allow a delving into any details of alleged infiltration, financial warfare, etc., for the reason that under F.R. Evid. 403, this would divert the jury from the issues raised in the indictment." (Order, Nov. 10, 1988, p. 7-8.)

Denial of Continuance

Defense counsel renewed a motion for continuance to the district court on November 16, citing the denial of all defense motions, and the granting of the government's motion *in limine*, concluding that these developments "have demonstrated the district court's reflexive drive toward an unreasonable trial date . . . which would have unavoidably required a delay in the trial date; and have resulted in a severe narrowing of defense options that has totally disrupted planning of the defendants' case . . ."

Attorneys' affidavits attached to the renewed motion averred that the court's granting of the *in limine* motion drastically affected their ability to be ready for trial on November 21. Mr. Williams, counsel for Joyce Rubinstein, stated:

> As a result of the District Court's Order of November 10, which essentially eliminated almost all of the defense's affirmative defense . . . counsel had been compelled to re-evaluate and begin to revamp defendant Rubinstein's case.

Mr. Webster, counsel for defendant Spannaus, set forth a range of tasks that he had been unable to perform—including review of specific evidence, and interviewing of witnesses. Mr. Moffitt addressed the problem presented with defending his client, defendant Small:

> As a result of the Court's ruling on the government's Motion in Limine, as counsel for Dennis Small, I am now required to retool and revise my defense in one week's time. . . . As an officer of this Court, I aver that there is simply no way that I can adequately prepare for trial on November 21, 1988 and provide Dennis Small effective assistance of counsel in accordance with the Sixth Amendment of the United States Constitution . . . [And] as a result . . . a conviction is inevitable if forced to trial on November 21, 1988.

At a motions hearing on November 18, the Court denied the renewed motion for continuance, with a lecture admonishing counsel that it would hear no "more wailing and moaning and carrying on and bellyaching about why I can't be ready for trial." (Tr., Nov. 18 p. 4-5)

Trial commenced on Monday morning, November 21, although counsel answered "not ready" when the case was called. *Voir dire* was concluded, and a jury selected, in less than two hours despite intense adverse pretrial publicity. The lack of time to prepare resulted in serious deficiencies in the ability of defendants both to contest the government's case and to present their affirmative defense. The defense was unable to interview most of the 53 listed government witnesses or to adequately investigate their background and involvement with defendants. Defense counsel were unable to adequately review and assimilate *Jencks* material (1,500 pages), Rule 16 material (9 file drawers), audio tapes (over 100), or government trial exhibits (almost 700 separate exhibits). Consequently, they were unable to adequately cross-examine and/or impeach the government witnesses and rebut much of the government's evidence.

The defense was equally hampered by the lack of time to prepare its own case. No defendant took the stand in his or her own behalf, although four of seven had planned to testify as reflected on the defendants' witness list provided to the prosecutors. Defendant testimony would have been particularly impor-

tant, since much of the government's case was based on statements attributed to defendants and material omissions, allegedly made by them in the course of soliciting loans. On December 16, the jury returned guilty verdicts on all 48 counts of the indictment. On January 20, 1990, the Fourth Circuit Court of Appeals affirmed the convictions. On February 5, 1990, Petitioners filed a request for rehearing with a suggestion for rehearing *in banc* which was denied on February 16, 1990.

SUMMARY OF ARGUMENT

Petitioners' case raises important questions of constitutional law and the right to a fair trial.

In our system of justice, there is no right more important than trial by jury. It is the citizen's protection against arbitrary and vindictive law enforcement and abuse of power by government. Yet the right to trial by jury is an empty formality unless an accused can present his full defense to the jury, on an equal footing with the prosecutor.

In the case at bar, the defendants were denied their right to defend themselves. The trial court, through discovery and evidentiary rulings, precluded major parts of the defense case and prevented the defendants from presenting and developing their theory of defense and the facts on which it was based. The trial court also rushed the defendants to trial with such haste that they were unable to adequately prepare their defense case. The trial court not only violated defendants' constitutionally protected right to defend, but it usurped the fact-finding function of the jury. By prejudging the factual basis of the defense, the court prevented the jury from hearing the facts on which it could base its determination of guilt or innocence.

Additionally, because of the widespread perception of injustice created by the conduct of the trial, this case raises questions about the integrity of the judicial system and public confidence in that system.

REASONS FOR GRANTING THE WRIT

I. PETITIONERS WERE DENIED THEIR RIGHT TO PRESENT A DEFENSE AND TO HAVE THEIR CASE DECIDED BY THE JURY.

A case such as this one reminds us of why trial by jury is so fundamental to our system of criminal justice. We tend to take trial by jury for granted, but it is important to recall that trial by a jury of citizens was developed as a protection against arbitrary and politically-motivated prosecutions. These reasons for trial by jury are as important and relevant today as they were two centuries ago:

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to higher authority. The framers of the constitutions strove to create an independent judiciary by the insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan v. Louisiana*, 391 U.S. 145 (1968).

The defendants, here, made it clear that they believed it to be a politically-motivated prosecution. Yet there need not be any special procedures for a "political" case: the jury system, properly used, should be in itself sufficient protection for an accused against a "corrupt or overzealous prosecutor" or a "compliant, biased, or eccentric judge." But for the jury system to work, a number of elements need to be present which were absent here. The accused must first of all be assured that a fair and impartial

jury is selected to hear his case. Secondly, he must be allowed to present his defense, his explanation, to the jury, with all the relevant facts and witnesses. Finally, an accused must be given sufficient time to prepare his case—otherwise the right to have a jury hear his case is a meaningless formality.

The Bill of Rights, with its Fifth and Sixth Amendment provisions for criminal procedure, was adopted as a protection against the abuse of power by government. *Barron v. Baltimore*, 7 Pet. 245 (1833). It would indeed be naive to think that such abuses of power cannot happen today, and that therefore the courts can be less vigilant about enforcing those protections. Yet, the trial court in this case clearly took the view that the goals of efficiency and expedition in the administration of the court's docket took precedence over a conscientious protection of the rights of the defendants to a fair trial.

How else could the court have inflexibly adhered to a schedule of sending the defendants to trial five weeks after arraignment in a highly complex mail fraud and tax fraud case involving over 500 government exhibits, 53 witnesses, and millions of documents? How else could the court have set a trial schedule which virtually *required* that all pretrial motions be denied? How else could the court have cut the heart out of the defense case ten days before trial on the grounds that the issues raised, although relevant, would "divert" the jury? And how else could the court have seated a jury in less than two hours in a case involving such massive and prejudicial pretrial publicity?

The specific acts of mail fraud charged against all seven defendants involved the solicitation of loans from their political supporters with the intention not to repay. At trial, the government repeatedly elicited evidence on nonpayment of loans as proof of such criminal intent. The defendants clearly intended to defend against these charges by showing that their capacity to ensure repayment was impaired by disruptive actions taken by the government and other third parties. Defendants' Motion for Disclosure of Exculpatory Material and its supporting Memorandum "telegraphed" this defense strategy. [See Petitioners' Appendix, A-165]

Defendants apparently regarded the most important disruption to be the unprecedented involuntary bankruptcy proceeding brought by the government against three publishing and distribution companies (including the company which held all the loan obligations at issue in the indictment, Caucus Distributors, Inc.). More than a year before the indictment issued the U.S. Attorney for the Eastern District of Virginia had obtained an *ex parte* order directing U.S. Marshals to seize the offices of the three companies on behalf of court-appointed Interim Trustees. The companies were raided and padlocked on April 21, 1987, and never reopened their doors. They were unable to raise any revenues or pay any creditors after that date.[4] At trial, the defense did show that, prior to the bankruptcy shutdown, substantial repayments were being made. But under the terms of the court's *in limine* ruling, they could not tell the jury that the United States government had initiated the bankruptcy seizure. The jury was allowed to learn that there had been a bankruptcy proceeding, but without knowing that the government commenced it, they might conclude that it was either an effort by the debtor companies to avoid paying their debts, or was caused by disgruntled lenders. Through the combined effects of the court's evidentiary rulings and the rush to trial, these defendants were denied the most fundamental right possessed by an accused: the right to defend themselves against charges brought by the government.

A. The Right to Defend Is Constitutionally Protected

The Bill of Rights provides specific protections to a person accused of a serious crime: due process of law, trial by jury, compulsory process to obtain witnesses in his favor, the right to

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[4] On October 25, 1989, the U. S. Bankruptcy Court dismissed the government's petitions, on grounds that the government had unlawfully invoked the court's jurisdiction. The court also held that two of the three alleged Debtors (including Caucus Distributors) were ineligible to be the subjects of an involuntary petition because they were non-profit, eleemosynary institutions. The Court ruled that the government had filed the petitions in "objective bad faith" and had perpetrated a "constructive fraud" on the court. This ruling however, was not before the Court of Appeals when it decided this case. *In re Caucus Distributors, Inc. et al.*, 106 B.R. 890 (Bkrtcy.E.D.Va. 1989).

confront adverse witnesses, and the assistance of counsel. Implicit in all of these specifically enumerated rights, and subsuming them all, is the right of an accused to present his defense in a court of law.

It was not always so. The progression from an inquisitorial system to an adversary system of justice spanned many centuries in English law.[5] It was not until the 18th century that a defendant in England had an equal right to present his case through witnesses. By the mid-17th century, a defendant could call witnesses, but he still lacked two advantages that the Crown did have: he couldn't compel witnesses, and he couldn't have them sworn.

Developments in the American colonies followed a similar course in the 17th century, but during the 18th century, many of the colonies put pro-defendant reforms into effect. By the mid-18th century, a defendant could subpoena witnesses and place them under oath in a number of the colonies. During the Revolution, the new states adopted their own Bills of Rights, which while containing different points of emphasis, all established the principle that a defendant should have the opportunity to present the essential elements of his case on terms equally advantageous to that of the prosecutor.[6]

The compulsory process clause of the Sixth Amendment was included in the Bill of Rights to provide for the calling of defense witnesses; an analysis of the circumstances of its drafting leads to the conclusion that its purpose was to guarantee a defendant's right to present evidence on an equal basis with the prosecution. One scholar suggests that the Framers intended "to remove all obstacles then extant to the ability of the accused to fully and fairly defend himself against criminal accusations."[7]

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[5] Paul Westen, "The Compulsory Process Clause," 73 *Michigan Law Review* 71 (Nov. 1974), p. 78f.

[6] *Id.*, at p. 94-95; cited in *Taylor v. Illinois*, 484 U.S. 400 (1988).

[7] Robert Clinton, "The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials," 9 *Indiana Law Review* 711 (April 1976), p. 738.

Up until recent decades, the trend of events since the adoption of the Bill of Rights was generally to place new obstacles in the way of a defendant's presentation of his defense.[8] The codification of criminal procedure and rules of evidence often operated to exclude evidence favorable to the defense. Increasing jurisprudential rigidity and formalization created new problems, often limiting a defendant's ability to fully present a defense.[9] The constitutional right to defend in criminal cases was not directly addressed by this Court until the 1960's. Previously, in the 1870's, the Court had recognized—in a civil case—the right to be heard; that ruling was based on due process grounds.

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. *Windsor v. McVeigh*, 93 U.S. 274, 277" (1876).

In a pair of cases dealing with summary contempt procedures, this Court clearly recognized that defendants have a constitutionally protected right to present a defense against criminal charges. *Cooke v. United States*, 267 U.S. 517 (1925); *In re Oliver*, 333 U.S. 257 (1948). The 1967 case *Washington v. Texas*, 388 U.S. 14 (1967), presented the problem of the right to defend in its most common form. The issue was the conflict between an evidentiary rule and the accused's efforts to introduce exculpatory evidence. That ruling has immediate bearing on the case at bar:

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[8] By contrast, Chief Justice John Marshall's handling of the Burr trial is remarkable for its broad construction of the compulsory process clause, and his generally expansive reading of the rights of a criminal defendant. *U.S. v. Burr*, 25 F.Cas. 30 (No. 14,692d)(C.C.Va. 1807); *U.S. v. Burr*, 25 F.Cas. 187 (No. 14,694)(C.C.Va. 1807). Marshall extended the subpoena power to include access to papers as well as a witness' testimony. *Id.* at 35. He did not demand specific proffers of relevance or materiality, recognizing that this would force premature disclosure of the defense case. *Id.* at 36. Moreover, he allowed the defendant to subpoena evidence in his favor prior to trial and even during the grand jury stage. *Id.* at 33.

[9] *Id.*, at p. 739-741.

> "The right to offer the testimony of witnesses, and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.*, at 19.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court asserted clearly that there exists a due process right to defend, and held that a mechanical interpretation of rules of evidence cannot be used to exclude evidence bearing on the guilt or innocence of a party.

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* 294.

In recent years, this Court has reiterated that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), citing *California v. Trombetta*, 467 U.S. 479, 485 (1984). The defendants in this case were denied the right to use the process of the court to obtain evidence which they considered to be exculpatory. They were also denied the right to confront and cross-examine the evidence against them, through the limitations imposed by the *in limine* order.[10] They

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[10] One commentator has noted what he calls an "alarming trend in the use of the motion *in limine*":

> Prosecutors have begun filing broad pretrial motions *in limine* to prevent entire defenses from ever being heard, much less considered, by a jury. These motions are appearing more commonly in

were also denied their right to prepare and call their own witnesses (including some of the defendants themselves) by the rush to trial and the ensuing lack of time to prepare—all in violation of their constitutional right to defend.

B. The Rush to Trial Violated The Right to Present A Defense

Petitioners have argued that the denial of a continuance by the trial court violated their Sixth Amendment right to effective assistance of counsel. Your *amicus* suggests that the denial of a continuance and the rush to trial also violated petitioners' constitutional right to defend, and urges this Court to consider the issue on this additional ground.

In his analysis of the right to present a defense, Professor Clinton suggests that problems due to lack of pretrial preparation should not be analyzed only as matters of assistance of counsel. Analyzing lack of preparation time only in terms of assistance of counsel "foists upon the accused the rather heavy burden of proving that defense counsel were ineffective, under the rigorous tests which courts usually apply to such claims."[11]

The Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, sets a minimum of 30 days before trial can commence, from the date a defendant first appears with counsel. Continuances well beyond the statutory maximum of 70 days may be granted when "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161 (h)(8)(A). Among the factors to be taken into consideration are:

> politically sensitive trials. . . . In this highly unorthodox use of the motion, prosecutors are asking trial courts to rule upon the appropriateness of an anticipated defense before the trial ever begins and before the government has presented any witness testimony, much less sustained its burden of proof.

Douglas L. Colbert, "The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial," 39 *Stanford Law Review* 1271 (July, 1987).

[11] *Supra*, Clinton, pp. 850-851.

> "(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself with the time limits established by this section." 18 U.S.C. 3161 (h)(8)(A)(ii).

This case was clearly a complex one with novel issues of law (such as the charging of defendant LaRouche with a "Klein" conspiracy to impede the IRS, combining that charge with the mail fraud counts against all defendants, and the unique and totally unprecedented government-initiated bankruptcy). Yet the defendants had only 34 days to prepare from the date of arraignment. This, in and of itself, constituted a violation of defendants' right to defend themselves.

C. The Trial Court Usurped The Fact-Finding Function Of The Jury

In petitioners' case, the trial court excluded crucial evidence on two somewhat contradictory grounds. Discovery as to "infiltration, harassment, and financial warfare" was denied as "irrelevant" to the charges.[12] On the other hand, the court's order granting the government's motion *in limine* was based on Federal Rule of Evidence 403 which pertains to the exclusion of *relevant* evidence; the court ruled that this evidence would "divert the jury from the issues raised in the indictment." These evidentiary rulings by the court not only prevented the defendants from presenting their defense, but, in so doing, the trial court also usurped the fact-finding functions of the jury.

In our system the jury, not the judge, is the trier of fact. It is not the function of the prosecutor or the judge to prescreen the defense case so that the jury only hears what the prosecution deems credible or appropriate. Here, the govern-

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[12] Order, Nov. 10, 1988, p. 1.

ment argued that the defendants' claims of government harassment were merely a "smokescreen" and just "the latest excuse" for not repaying loans. Couldn't the jury be trusted to see through the defendants' excuses if they were that flimsy? But the court, at the request of the prosecutors, in effect granted pretrial summary judgment to the government, preventing the jury from hearing the defense's explanation. As this Court held in *Washington v. Texas*, the right to present a defense is "the right to present the defendant's version of the facts as well as the prosecution's to the jury *so it may decide where the truth lies.*" *Supra* at 19 (emphasis added).

More recently, this Court has held that "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and *the right to put before the jury evidence that might influence the determination of guilt.*" *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1967) (emphasis added).

The prosecutors in this case repeatedly presented the jury with evidence that lenders had not been repaid. For example:

1. *Lita Witt*

   Q. Okay. Did you ever get that principal?

   A. No, not a dime.

(Tr., Nov. 22, 1988, p. 12.)

2. *Goodwill Post*

   Q. Have you gotten any moneys from them other than the $250?

   A. Not a cent.

(Tr., Nov. 29, 1988, p. 8.)

In their closing arguments, the prosecutors argued to the jury that "a lot of people lost a lot of money." (Tr., Dec. 15, 1988, p. 26) It can be inferred that the jury was heavily influenced by these statements, given the jury foreman's statement after the trial that the reason for convictions was that "there was a lot of money lost." (*Washington Post*, Dec. 17, 1988.)

Yet the defendants could not present their defense: that it was the government itself which caused a lot of the money to be lost. The defense could not give the jury a fully-developed factual picture of harassment and interference with their political organizing and fundraising which impaired their ability to repay. They could allude to it, but they were barred by the motion *in limine* from "delving into details" which would flesh out the picture and show it to be more than just a convenient excuse for not paying debts. More importantly, the defense was barred from eliciting evidence to show—either through defense witnesses or cross-examination of government witnesses—that it was the government that caused the shutdown of the companies which held the loans, and that as a result the companies were prohibited *by court order* from repaying any loans.

Your *amicus* does not know if the jury would have found the defendants' explanation and their version of the facts credible. The jury might have concluded—as the Boston jury apparently did—that there was just too much evidence of government wrongdoing to find the defendants guilty. Or, they might have concluded—as the prosecutors urged—that the defendants were making up excuses and never intended to repay the loans. But the point is, we don't know—and no one knows—what the jury might have determined had it had all the facts before it. It is the jurors—not the judge—which are "the sole triers of fact and credibility." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

The question of intent was a crucial one for the jury to decide. The government asserted that the defendants knew all along that they couldn't repay loans and that they solicited the loans with the conscious knowledge that they couldn't repay them. The prosecution structured its case so that the crucial evidence of intent was the ultimate nonpayment of the loans. Certainly the demonstrated loss of hundreds of thousands of dollars by the lender witnesses had a significant impact on the jury.

There was no disputing that many lenders had lost a lot of money. So the actual issue was, who was responsible, and did the defendants have reason to believe that they actually could

repay the loans? Thus, the burden of proof really shifted to the defense, to show that they had reason for their optimism, and that they had acted in good faith. Yet, the defendants were denied the right to "delve into details" on matters that objectively impaired their ability to repay loans, and on matters which subjectively influenced their state of mind about their anticipated ability to repay.

By ruling that the evidence of harassment was irrelevant, or that evidence concerning the bankruptcy was a diversion, the court in fact predetermined the issue of intent. But intent is an issue for the jury, not for the judge.

> "It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system, (unless in exceptional cases), both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury." *People v. Flack*, 125 N.Y. 324, 334, cited in *Morisette v. U.S.*, 342 U.S. 246, 274 (1952).

In this case, by invading the function of the jury, the court destroyed the significance of the jury trial itself:

> Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct, the one responding to law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury." *Id.* at 274.

II. THIS CASE PRESENTS FUNDAMENTAL QUESTIONS ABOUT "THE INTEGRITY OF THE JUDICIAL SYSTEM"

Petitioners' case is one which has drawn widespread national and international attention, and which has raised those

very concerns about the integrity of the judicial system and public confidence in that system which were addressed by this Court in *United States v. Nixon:*

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *U.S. v. Nixon*, 418 U.S. 683, 709, (1974).

The fact that a highly controversial, anti-establishment political figure and his associates were indicted, tried, and convicted under such rapid-fire procedures and restrictions on their ability to defend themselves, has created a widespread perception that an injustice was done. This is evidenced by the number of *amicus curiae* briefs submitted to the Court of Appeals by European notables as well as the fact that over 800 attorneys from the United States joined in submitting one *amicus* brief to the Appeals Court when petitioners' case was before it.

CONCLUSION

For all the reasons set forth above, this Court should grant the petition for a writ of *certiorari*.

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